LIEW MOK POH & ANOR.

v.

BALAKRISHNAN MUTHUTHAMBY

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[CIVIL ORIGINATING MOTION NO. 25-10-89]
20 DECEMBER 1989

LAND LAW: *Application for removal of a private caveat - Loan - Charge - Security for loan - Special power of the attorney - Subsequent lodgement of caveat - Section 4(4) of the Powers of Attorney Ordinance - Whether there is a time limit for the depositing of the instrument - Date power of attorney becomes effective - Question of prior equity.*

On 18 March 1989, the owner of a piece of land borrowed money from the respondent. The money was obtained by the respondent by way of a loan from his own bankers. The respondent in turn charged his own land to the bank as collateral for the loan.

By way of security for this loan, the owner executed a special power of attorney in favour of the respondent. This power of attorney was given for the valuable consideration represented by the loan aforesaid and the instrument specified that it was irrevocable.

The power was later duly stamped. The respondent then applied to the Registrar of Titles to lodge a private caveat against the said land. At the time of the registration of the caveat, the power of attorney had not been deposited with the High Court.

The Court had to decide as to who had the prior equity.

Held:

[1] It must be implied from s. 6(1)(c) of the Powers of Attorney Ordinance that once an irrevocable power for valuable consideration has been given, the donor cannot thereafter exercise any of the powers already given without the concurrence of the donee.

[2] The power of attorney was a good power and the instrument was a valid instrument notwithstanding the fact that the date on which the power has to be exercised was postponed to 1 April 1990, the respondents interest in the land arose on the date on which the power was exercised.

[3] The respondent had a caveatable interest in the land and he was entitled to protect this interest by the lodging of a caveat.

[4] The power of attorney was not too vague to be enforced just because the power did not specify the price at which the land should be sold.

[5] It is clear that the respondents equity is the prior equity; the applicant must be deemed to have had constructive notice of the respondent's interest in the land.

[6] The applicant's claim for the removal of the respondent's caveat is dismissed.

[Order accordingly.]

Cases referred to:

United Malayan Banking Corporation Berhad v. The Official Receiver and Liquidator of Soon Hup Seng Sdn. Bhd. & Anor. [1986] 1 MLJ 75

Rajinder Kaur v. Jeswant Singh [1987] 1 MLJ 214

Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145

Krishnan Kumar v. United Malayan Banking Corporation Bhd. [1983] 1 MLJ 107

Legislation referred to:
Powers of Attorney Ordinance, ss. 4(1), (4), 6(1)(c)

For the plaintiffs - C.K. Lee; M/s. C.K. Lee & Shukor
For the defendant - A Kanesalingam; M/s. Kanesalingam & Co.

JUDGMENT

Mahadev Shankar J:

This is an application for the removal of a private caveat lodged by the respondent against the land held under Certificate of Title HS(D) 16394 Lot 8912 (the said land) owned by one Lim Gee Mooi (the owner).

The said land was charged by the owner to the Pacific Bank Berhad on 28 June 1984.

On 18 May 1989 the owner borrowed RM38,000 from the respondent. This money the respondent obtained by way of a loan from his own banker Malayan Banking Berhad. The respondent charged his own land to Malayan Banking Berhad as collateral for the loan.

By way of security for this loan of RM38,000 the owner executed a special power of attorney in favour of the respondent. This power of attorney was given for the valuable consideration represented by the loan of RM38,000 aforesaid and the instrument specifies that it was made irrevocable. Clause (1) of this power empowered the respondent to transfer, sell, charge, lease or otherwise deal with the said land. Clause (5) provided that the power shall become effective on 1 April 1990 in the event that the owner fails to repay the said-loan of RM38,000 taken by the respondent from Malayan Banking Berhad and the interest thereon. Clause (8) of the power specifically permitted the respondent to lodge a private caveat against the said subject to the existing charge in favour of Pacific Bank Berhad. The owner signed, sealed and delivered this power in the presence of an advocate & solicitor who attested the document as required by law. The power was then duly stamped. Immediately after the execution of this power of attorney the respondent applied to the Registrar of Titles to lodge a private caveat against the said land. The application to lodge the caveat was accompanied by a statutory declaration affirmed by the respondent. The special power of attorney aforesaid was attached to the statutory declaration. The caveat was registered on 26 May 1989.

At the time of registration of the caveat the power of attorney had not yet been deposited with the High Court. But then s. 4(4) of the powers of attorney ordinance no. 64 of 1949 (the ordinance) provides that the requirement of a deposit of the power of attorney which is stipulated in s. 4(1) shall not apply to instruments executed and used for the sole purpose of carrying out transactions in the office of the Registrar of Titles provided they are attested in accordance with any law for the time being enforced regarding the attestation of such instruments.

Consequently it appears to me that nothing turns on the point that the power of attorney had not been deposited on the date when the caveat was lodged. In any event the power was deposited with the High Court on 9 November 1989. I have pointed out in *United Malayan Banking Corporation Berhad v. The Official Receiver and Liquidator of Soon Hup Seng Sdn. Bhd. (In Liquidation) & Anor.* [1986] 1 MLJ 75 at p. 81 that the ordinance does not provide a time limit for depositing the instrument.

At the risk of emphasising the obvious, the effect of the respondent's caveat was to give notice to the world that the owner of the said land had divested herself of any power to deal with the land by giving the special power of attorney to the respondent.

Nevertheless, on 1 June 1989 the owner entered into a written agreement with the two applicants above-named whereby she contracted to sell the said land and the applicants agreed to purchase the same from her free of all encumbrances for RM85,000. A sum of RM35,000 was paid by the applicants to the owner and the remaining balance of RM50,000 was to be released by the applicants' end financiers subsequently. Not only did the owner and the applicant execute an agreement but also on 27 June 1989 the owner executed a formal document of transfer in the form required by the National Land Code.

On 3 October 1989 the applicants lodged their own private caveat on the presentation No. 12159/89 Jilid 158 Folio 94 (the applicants' private caveat) to protect their interests as purchasers of the said land.

According to the applicant's affidavit-in-support of this application they only discovered the respondent's caveat after they lodged their own caveat.

So they filed this application to have the respondent's caveat removed.

Mr. C.K. Lee Counsel for the plaintiffs submitted that since the power was to become effective only on 1 April 1990 it had no effect until that date. He further submitted that since the respondent did not hold the title deed to the said land (the same being with the Pacific Bank Berhad) the effect of the power was merely to create a contractual obligation to repay a debt and this did not by itself create a caveatable interest.

With respect to Mr. Lee I do not consider that this submission has any merit.

This power was given for valuable consideration and was made irrevocable. Accordingly under s. 6(1)(c) of the ordinance the respondent being the donee of the power cannot at any time be prejudicially affected by notice of anything done by the owner of the land as the donor of the power without the concurrence of the respondent. I agree with Mr. Kanesalingam Counsel for the respondent that it must be implied from this provision that once an irrevocable power for valuable consideration has been given, the donor cannot thereafter exercise any of the powers already given to the donee without the concurrence of the donee.

In its proper perspective therefore the first point to note is that the agreement which the owner entered into for the sale of the land to the applicants and the subsequent transfer which the owner executed are both documents which could not confer any interest or title whatsoever to the land to the applicants.

So far as the power itself is concerned I hold that it was a good power and the instrument was a valid instrument notwithstanding that the date on which the power was to be exercised was postponed to 1 April 1990. The respondent's interest in the said land arose on the date on which the power was executed. It was an interest for which he had paid RM38,000 by way of a loan to the land owner. Subject to the prior interest of the Pacific Bank Berhad as the first chargee, the respondent was entitled to look to the land for the recovery of his loan which the owner had until 1 April 1990 to repay. Mr. Lee did not cite any authorities in support of his argument. Mr. Kanesalingam however has submitted a number of authorities to which a passing reference may now be made.

The distinction between this case and *Rajinder Kaur v. Jeswant Singh* [1987] 1 MLJ 214 is that in that case the power of attorney could be and was revoked at the material time whereas in ours the power is irrevocable.

Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Tudjun [1974] 1 MLJ 145 and *Krishna Kumar v. United Malayan Banking Corporation Bhd.* [1983] 1 MLJ 107 are both instances where caveats were allowed to be maintained notwithstanding that the interest in question in the land was by way of a future expectation of an interest in land arising out of an existing contract imposing an obligation on the land owner.

I therefore cannot agree that the respondent did not have a caveatable interest in this case. In the view of this Court he had such an interest which he was entitled to protect by lodging his caveat.

A subsidiary point taken by Mr. Lee on the power of attorney was that it was too vague to be enforced because the power did not specify the price at which the land should be sold. This contention also I reject. If the respondent is driven to sell the said-land to recover his loan, his position was that of a trustee under a trust for sale and he would be obliged to obtain the best possible price available in the market. Once he got the money the power itself provides that the respondent is to account for the proceeds of the sale.

Turning now to the respective equities of the parties, it is patently clear that the respondent's equity is the prior equity in this matter. The applicants must be deemed to have had constructive notice of the respondent's interest in this land. If they were not aware of his caveat, the applicants have only themselves to blame. In all the circumstances I make the following orders in the interests of justice to all concerned:

(1) The applicants claim for the removal of the respondent's caveat is dismissed.

(2) The Registrar of Titles is directed to remove forthwith the applicants's caveat presentation no. 12159/89 Jilid 158 Folio 94 entered by the applicants against the said-land held under HSD 16394, PT No. 8912 (1266) Mukim of Kuala Lumpur, Daerah Petaling, Negeri Selangor.

(3) The costs of this application will be taxed and paid by the applicants to the respondent.

Also found at [1990] 1 CLJ 933